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No. 96-645

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SUBARU OF AMERICA, INC., and
FUJI HEAVY INDUSTRIES, INC.,
Petitioners,

v.

STEVEN D. COMPTON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the district court abuse its discretion in this case in admitting the expert engineering testimony of Larry Bihlmeyer—an engineer with over fifteen years of experience in automobile design matters—on the issue of the roof design of the 1982 Subaru station wagon?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Steven Compton's Injury.

On February 19, 1988, Steven D. Compton was traveling as a passenger in a 1982 Subaru GL Station Wagon (hereinafter "Accident Vehicle") on U.S. Hwy. 83 near Scott City, Kansas. Compton was seated immediately behind the driver. The driver lost control of the vehicle, which left the roadway rolling over twice.[1] During the first roll of the vehicle, a portion of the roof and roof

[1] Petitioners erroneously state that the Accident Vehicle was travelling at 60 mph. Pet. 1. Both David Bilek, plaintiff's accident reconstruction expert and Kenneth Orlowski, defendant's expert, agreed that the Accident Vehicle rolled over at approximately 30 mph. Res. C.A. App. at 99, 243.

support structures [2] immediately above Compton collapsed inward violently compressing his head and neck downward. As a result of the collapse of the roof and support roof structures Compton suffered a spinal cord injury and was rendered a quadriplegic.

B. Larry Bihlmeyer's Qualifications.

1. Bihlmeyer's education.

At trial Compton presented the testimony of Larry Bihlmeyer as a design expert. Bihlmeyer earned a bachelor's degree in aerospace engineering from the University of Michigan and a masters degree in mechanical engineering from Wayne State University. During his university education he took courses in mechanical engineering dynamics, structural analysis, metallurgy, and other courses which involved basic engineering design concepts. Pet. C.A. App. at 256. Bihlmeyer is a member of the Society of Automotive Engineers, the American Society of Mechanical Engineers, and the American Society of Safety Engineers. *Id.* at 328-329.

2. Bihlmeyer's automotive work experience.

In October of 1972, Bihlmeyer began work as an automotive engineer at Ford Motor Company in the brake department. Bihlmeyer was involved in developing brakes on Ford trucks and pickups to meet federal braking standards. Pet. C.A. App. at 284.

Bihlmeyer then moved to Ford's wheel structures department. *Id.* at 286-288. Bihlmeyer worked on wheels, including determining what steel was used and how the

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[2] Petitioners erroneously state that it is undisputed that Federal Motor Vehicle Safety Standard 216, 49 C.F.R. § 571.216, applied to the Subaru station wagon. There are no federal standards which specifically govern the strength of the C and D pillars on automobiles. The district court found that FMVSS 216 only applied to the A pillar, not the D pillar at issue in this case. Res. Supp. C.A. App. at 73-76; Pet. 12a.

wheels were welded. *Id.* at 287. At Ford, while working in the wheel program, Bihlmeyer participated in analysis of welding work including: correct welding form, testing welds, welding structure, weld failure analysis and how to determine bad welding from good welding from an engineering standpoint. *Id.* at 315.

Bihlmeyer then began work designing fuel systems at Ford. *Id.* at 288-294. Bihlmeyer was involved in crash testing, evaluating federal fuel system integrity standards and analyzing crush or intrusion on fuel tank systems in vehicle accidents. *Id.* at 289-292. Bihlmeyer worked as a design engineer in setting up fuel system tests. *Id.* 290-292. In designing fuel systems Bihlmeyer considered the crashworthiness of the vehicle and the potential for intrusion into the fuel system during a crash. *Id.* at 295-296.

In September of 1981, Bihlmeyer began work in vehicle engineering which utilizes engineering principles in examining the whole vehicle. *Id.* at 301. Part of Bihlmeyer's responsibilities included developing a Ranger Supercab pickup. *Id.* at 302. Part of this task involved the design, release and approval of production of the cab and roof structure of the Ranger Supercab. *Id.* at 303. As a design engineer, Bihlmeyer was involved in the development of the roof design of the Ranger Supercab. *Id.* at 303. Bihlmeyer was involved in the welding aspects of the Ranger Supercab model. Id. at 303. He was involved in examining the roof structure of the Ranger Supercab model in terms of strength of materials. *Id.* at 304-305. As part of the strength of materials for the roof structure, Bihlmeyer examined the welding pattern of the roof panel and its supporting system. *Id.* at 305. Bihlmeyer was one of the design engineers involved in determining the number of welds and location of welds necessary in developing the Ranger Supercab roof structure. *Id.* at 305-306.

After leaving Ford in 1987, Bihlmeyer began work as a consulting engineer. *Id.* at 309. Bihlmeyer has inspected hundreds of vehicles involved in rollover acci-

dents. *Id.* at 309. He has studied technical papers on injury causation from roof intrusion and roof collapse. *Id.* at 309. Bihlmeyer performed safety analysis including conformance of various parts of automobiles, trucks and pickups with federal, state or industry regulations. *Id.* at 325. Bihlmeyer has performed design analysis of the adequacy of the design of roof and roof support structures in rollover and roof-crush analyses of crashworthiness of vehicles. *Id.* at 325. He has performed several hundred analyses of roof and roof support structures. *Id.* at 325. Bihlmeyer has been involved in drop tests of various vehicles. *Id.* at 356.

3. *Bihlmeyer's engineering analysis of the Accident Vehicle.*

Bihlmeyer inspected the Accident Vehicle and an identical exemplar vehicle. Pet. C.A. App. at 335-337. He inspected the roof and roof support structures of both vehicles. *Id.* at 336. Bihlmeyer made notes, took measurements, photographs, and made drawings and diagrams of the welding pattern of the roof and roof support structures of the Accident Vehicle. *Id.* at 336-337. Bihlmeyer took measurements of the welds, distances between welds, and identified the locations of the welds on the Accident Vehicle. *Id.* at 337.

Bihlmeyer took measurements to determine the amount of headroom in the Accident Vehicle, both before and after the roof crush. *Id.* 429-430. He compared his measurements with the headroom in the hundreds of other vehicles he had examined and compiled a list of headroom measurements derived from a variety of sources. *Id.* 432-435.

Bihlmeyer measured the thickness of the left D pillar and determined it was .027 inches. *Id.* at 524-525. Bihlmeyer measured the thicknes of the right D pillar and determined it was .033 inches. *Id.* at 525. He identified

points of deformation involving the B, C, and D pillars.[3] *Id.* at 525-526. Bihlmeyer identified where the separate pieces that composed the side header[4] separated causing weakness. *Id.* at 526-527. Bihlmeyer identified where the bows were not welded to the roof panel. *Id.* at 527-528.

Bihlmeyer reviewed the depositions of Compton's experts David Bilek, a mechanical engineer and accident reconstructionist, and Anthony Sances, Ph.D., a biomedical expert who reviewed Compton's injuries. *Id.* at 337-338. Bihlmeyer reviewed the deposition testimony of Kenneth Orlowski, the engineer expert witness hired by Subaru/Fuji.[5] *Id.* at 338. He compiled various technical

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[3] The roof support pillars of the Accident Vehicle and other vehicles are designated by letters. The front pillars on either side of the windshield are the "A" pillars, the pillars behind the front doors are the "B" pillars, the pillars behind the rear doors are the "C" pillars. In a station wagon the rear pillars are the "D" pillars. Pet. C.A. App. at 353.

[4] The header is a framework which helps to support the roof panel. The windshield header runs between the edge of the windshield and the roof panel. The side header runs from front to back along the edge of the roof on the side of the car. Pet. C.A. App. at 352.

[5] Kenneth Orlowski was employed by General Motors Corporation from 1965 to February 1988. He received his bachelor's degree in mechanical engineering from General Motors Institute in 1970. Res. Supp. C.A. App. at 222-231. He was a junior engineer/junior draftsman from 1965 through 1969. *Id.* at 248. From 1965 to 1988 he was never responsible for the design of a roof and roof support structures for any vehicle. *Id.* at 275-276. In 1971 he was transferred to the Engineering Analysis Department of engineering staff of General Motors, where he stayed until his retirement from General Motors in 1988: *Id.* at 221-235. Engineering Analysis is the engineering litigation support group at General Motors. Approximately 50 percent of Kenneth Orlowski's time was spent in direct involvement in product liability claims filed against General Motors. Kenneth Orlowski estimated that he testified on behalf of General Motors by deposition or at trial approximately 84 times prior to his retirement in 1988. *Id.* at 258-262. Upon his retirement, Kenneth Orlowski formed Safety Analysis Inc., a litigation engineering con-

papers and performed research on rollovers, welding and roof intrusion. *Id.* at 339-343.

4. *Bihlmeyer's design defect opinions.*

Bihlmeyer offered opinions concerning the design of the roof and roof support structures of the Accident Vehicle. The sheet metal of the D pillar was too thin and the lateral bow at the rear of the roof was too thin. Pet. C.A. App. at 490-496. The D pillar was not reinforced properly and the roof structure was not welded to the roof panel. *Id.* at 497, 500.

There were an insufficient number of welds where the D pillar attached to the rear header; an insufficient number of welds at the side header near the B pillar; and an insufficient number of welds at the top of the C pillar. *Id.* at 501. There were excessive cut outs in structural areas at the lower D pillar area, the rear header area, and, at the side header forward of the B pillar. *Id.* at 501. The weakest pillar in the roof support structure design was the D pillar. The D pillar's outer panel measured .027 inches, which is too thin to provide adequate support for the roof and roof support structure. *Id.* at 490.

Bihlmeyer demonstrated where the D pillar buckled and failed during the accident and stated that the buckling and crush could have been avoided by reinforcing and/or bracing the pillar. *Id.* at 490-492. Bihlmeyer demonstrated that the A, B and C pillars in the Accident Vehicle were designed with reinforcement features which provided additional strength and resistance to crush. The D pillar was not reinforced and was hollow at the point it attached to the roof. *Id.* at 498.

Excessive cut outs in stuctural areas existed in the lower left D pillar area, the rear header area and in the side

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sulting firm. He currently devotes 100 percent of his time as a consulting engineering/expert witness for the automotive industry. *Id.* at 235-236, 267-268. He has testified by deposition or at trial an additional 66-72 times from 1988 to April 13, 1994. *Id.* at 267-270.

header forward of the B pillar. *Id.* at 501. Using demonstrative exhibits, Bihlmeyer illustrated how the left side header bent down during the accident and that the D pillar buckled down, pulling the top of the roof down with it over the left rear passenger compartment.

Using demonstrative exhibits, Bihlmeyer explained how the roof panel and rear bow were attached to the pillars and headers. He explained that where the header was welded together to form a V, there was a gap between the roof panel and the rear header indicating that there were no welds around the inner perimeter of all headers and that the headers were not welded to the roof panel. *Id.* at 508. A gap between the roof panel and the beam that supports the roof allows the roof to start to move following impact before the roof meets any internal resistance. This gap design can cause movement in the wrong direction, adding to the intrusion before the roof structure stops the movemet. *Id.* at 508-509.

From the C pillar to the D pillar there was a significant gap along the side header. There were no welds between the header and the inside edge of the header and the roof panel. *Id.* at 509. Because of the insufficient welds, the left side header and the rear header bowed and were pushed down by the roof. *Id.* at 509. There were no welds between the roof panel and the side header. There were no welds around the perimeter of the roof and the bows were not welded to the roof. *Id.* at 510. Bihlmeyer demonstrated that the side header was made of separate pieces which were attached together to form a long beam. However, the rear connection had separated and was pulled out and down because there were no welds across the end of the beam. *Id.* at 511.

C. The District Court's Rejection Of Petitioners' Challenges To Bihlmeyer's Testimony.

1. *Fed. R. Evid. 104(a) hearing.*

Bihlmeyer presented testimony concerning design defects in the Accident Vehicle. At trial, Bihlmeyer testi-

fied extensively in direct and cross-examination about his qualifications and experience as an engineer and design expert. Pet. C.A. App. at 253-415. The court then heard Subaru/Fuji's argument that Bihlmeyer was not qualified under Fed. R. Evid. 702 to testify. Pet. 21a-31a. The court held a hearing pursuant to Fed. R. Evid. 104(a) and considered Bihlmeyer's qualification and experience under Fed. R. Evid. 702. *Id.* The court also examined whether *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) applied to Bihlmeyer's testimony. After careful consideration, the court determined Bihlmeyer's testimony was not "scientific" knowledge as defined in *Daubert*. The district court stated.

> I don't think the Daubert case has a lot to do with the problem that I'm faced with. The Supreme Court says: Faced with a proffer of expert scientific testimony the trial judge must determine at the outset pursuant to Rule 104(a), whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue. Then it goes on to say: This entails a preliminary assessment of whether the reasoning and methodology underlying the testimony is scientifically valid. I don't think we're dealing with that here. Really. But to the extent that you might say that we are, clearly there's some scientific knowledge involved in the testimony. . . . So to the extent the Daubert case is applicable, it's applicable.

Pet. 24a-25a.

2. *The district court's denial of Subaru/Fuji's motion for judgment as a matter of law.*

In denying Subaru/Fuji's motion, the district court stated:

> Bihlmeyer did not offer any "scientific" opinions. His opinions did not concern a complicated, experimental or esoteric topic at the cutting edge of science. Instead, Bihlmeyer's design defect opinions were of the

> "technical, or other specialized knowledge" variety; that is, they purportedly were engineering opinions derived from his training as an engineer and his experience working in the automotive industry . . . .

Pet. 17a.

The district court's determination that Bihlmeyer's testimony was not "scientific knowledge", is a factual finding based on the testimony presented by the expert witness, his qualifications and experience, and how those two intertwine to result in the proffered opinion. Bihlmeyer did not testify to "scientific knowledge" because he reached his conclusions based on his own expertise and experience, not the methods and procedures of science. Applying the *Daubert* factors, the trial court discussed *Daubert*'s concept of evidentiary reliability:

> Three of [the Daubert] factors have no logical application to Bihlmeyer's opinions. Factors such as rate of error, peer review and acceptance in a "relevant scientific discipline" have little, if any, bearing on mundane, 'professional witness' engineering testimony such as Bihlmeyer's.

Pet. 18a.

Thus, the district court applied the parameters of *Daubert* and determined it was not dealing with "scientific knowledge". The district court's factual finding that Bihlmeyer's testimony was not "scientific" and its application of the *Daubert* Part II-C factors was not an abuse of discretion.

D. The Tenth Circuit Affirmed The District Court's Factbound Determination, Concluding That The Court Did Not Abuse Its Discretion.

The Tenth Circuit, applying an abuse of discretion standard, affirmed the district court's admission of Bihlmeyer's testimony. Petitioners attempt to create an apparent legal issue out of that factbound determination by

mischaracterizing this Court's holding in *Daubert* and by misrepresenting the Tenth Circuit's holding in *Compton*.

The court of appeals determined that the district court initially and properly evaluated Bihlmeyer's testimony in a Rule 104(a) hearing and made the factual determination that Bihlmeyer was qualified to offer an opinion on the defective design of the Accident Vehicle. Pet. 3a. The Tenth Circuit then analyzed Bihlmeyer's testimony that the design and roof support structures in the Accident Vehicle were defective because they permitted excessive roof crush. Pet. 3a. The court made specific factual findings that Bihlmeyer "pinpointed areas of the roof structure where . . . additional support was required." Pet. 3a. The *Compton* court then evaluated Bihlmeyer's engineering analysis of the Accident Vehicle and determined that he "reached his expert conclusions by drawing upon general engineering principles and his twenty-two years of experience as an automotive engineer." Pet. 9a.

Opining that the district court may have erred by applying the *Daubert* factors to Bihlmeyer's testimony at all, the court nonetheless determined that the district court fulfilled its responsibilities of evaluating the relevance and reliability, see Pet. 8a, of Bihlmeyer's testimony under Rule 702. Pet. 9a. Noting that *Daubert* considered the admissibility of novel scientific evidence, the court of appeals determined that the *Daubert* factors did not apply to the evaluation of Bihlmeyer's testimony which was based "solely on experience or training." Pet. 8a. Citing post-*Daubert* Tenth Circuit cases which evaluated non-scientific expert testimony under the relevance and reliability requirements of Rule 702, see Pet. 8a, the court of appeals rejected the application of the *Daubert* factors to non-scientific expert testimony based on experience or training. Pet. 8a. After examining the record, the court of appeals concluded that the district

court "fulfilled its responsibility under Rule 702" and did not abuse its discretion in admitting Bihlmeyer's testimony. Pet. 10a.

REASONS FOR DENYING THE WRIT

I. THE TENTH CIRCUIT'S DECISION WAS CORRECT.

A. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

1. *The only issue in* Daubert *was the validity of the* Frye *test.*

In *Daubert* the issue before the Court was whether the *Frye* [6] test was supplanted by the adoption of the Federal Rules of Evidence. *Daubert* examined whether results obtained from test tube, animal studies and reanalysis of previously conducted studies could be used to establish a link—contrary to previous studies—between the anti-nausea drug Bendectin, taken by women during pregnancy, and limb reduction birth defects in their fetuses. *Daubert,* 509 U.S. at 582. Presented with plaintiffs' novel scientific evidence establishing a link between the drug and plaintiffs' injuries this Court was asked to "determine the standard for admitting expert scientific testimony in a federal trial." *Daubert,* 509 U.S. at 582. Finding that the *Frye* test was superseded by the Federal Rules of Evidence, the Court recognized that Rule 702 itself provided the guidance for screening the admission of scientific expert testimony. *Id.* at 589.

2. Daubert *emphasized the "liberal thrust" of the Federal Rules of Evidence.*

Daubert noted the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to 'opinion' testimony." *Daubert,* 509 U.S. at

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[6] *Frye v. United States,* 54 App. D.C. 46, 47, 293 F. 1013, 1014 (1923).

588 (citations omitted). "The Rules were designed to depend primarily upon lawyer-adversaries and sensible triers of fact to evaluate conflicts." *Id.* at 589 (quoting Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended,* 138 F.R.D. 631, 631 (1991)).

Rule 702 confides to the trial judge the gatekeeping responsibility to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert,* 509 U.S. at 589. "[W]e do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence." *Id.* at 593 n.11. "[T]he Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* at 597.

3. Daubert *only applies to scientific knowledge.*

Daubert's limitations are evident in the first sentence of the opinion which states: "[i]n this case we are called upon to determine the standard for admitting expert *scientific* testimony in a federal trial." *Id.* at 582 (emphasis added). *Daubert* reinforces its limitations by emphasizing, with italics, portions of Rule 702 in discussing how this rule replaced *Frye*: "[*i*]*f scientific,* technical, or other specialized *knowledge will assist the trier of fact* to understand the evidence or to determine a fact in issue" an expert "may testify *thereto.*" *Daubert,* 509 U.S. at 589. If this Court intended to craft a rule regarding all expert testimony, presumably it would not have emphasized only "scientific knowledge." In addition, *Daubert* extensively develops and defines what it means by "scientific knowledge." *Id.* at 592-595. After determining that Rule 702 requires expert testimony to be both relevant and reliable, *Daubert* explains what is contemplated by the language "scientific . . . knowledge" in Rule 702. *Id.* at 590. The

Court immediately drops a footnote explaining that while in this case the Court is discussing "scientific knowledge":

> Rule 702 also applies to 'technical, or other specialized knowledge.' Our discussion is limited to the scientific context because that is the nature of the expertise offered here.

Id. at 590 n.8. After clarifying in footnote 8 that the Court is now limiting its discussion to "scientific knowledge," *Daubert* goes on to offer some general guidelines for district courts to evaluate the evidentiary reliability of scientific expert testimony. *Id.* at 591.

In Part II-C of the opinion *Daubert* sets forth a list of non-exclusive factors that can be used to determine the evidentiary reliability of scientific expert testimony. *Id.* at 592-595. The Part II-C *Daubert* factors suggest that courts evaluate scientific expert testimony by examining whether the theory or technique under consideration: (1) can be or has been tested; (2) has been subject to peer review and publication; (3) has a known rate of error; and (4) is generally accepted in that field. *Id.* at 593-95.

Clearly, the language in *Daubert* stating that all expert testimony admitted under Rule 702 must be both relevant and reliable applies to all expert testimony. However, the specific factors developed by the Court in Part II-C of the opinion are limited to the evaluation of scientific expert testimony of the type presented in *Daubert*. *Id.* at 590 n.8.[7]

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[7] Justice Blackmun's "general observations" about the factors that a federal judge ought to consider in evaluating the soundness of scientific methodology, set forth in part II-C of his opinion, are specifically aimed at the evaluation of scientific testimony. Of course, some of these factors may be highly relevant to an evaluation of certain types of nonscientific expert evidence. For example, whether the proffered methodology can be and has been tested may very well be pertinent to an examination of nonscientific but "technical" expert evidence. Peer review and publication may be an important factor with respect

4. *Under* Daubert, *cross-examination, presentation of contrary evidence and proper jury instructions are the generally recognized methods for challenging expert testimony.*

Expressing confidence in the capability of juries and the adversary system, the Court rejected Petitioners' concerns in *Daubert* that abolition of the *Frye* test would lead to presentation of absurd and irrational pseudoscientific assertions. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596 (citation omitted). The Court also recognized that the district court remains free to direct a judgment under Rule 50(a), if insufficient evidence is present "to allow a reasonable juror to conclude that the position more likely than not is true." *Id.* at 596. "These conventional devices, rather than wholesale exclusion under an uncompromising 'general acceptance' test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702." *Id.*

This Court in *Daubert* rejected the rigid, restrictive approach to the admission of expert opinion testimony urged by Petitioners in this case as being contrary to the Federal Rules. Petitioners' arguments that Part II-C of *Daubert* **must** be satisfied before *any* expert testimony is admitted under Rule 702 is in conflict with the liberal thrust of the Rules in allowing expert opinion testimony.

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to testimony involving the social sciences. And the "general acceptance" of a methodology within a particular discipline will be crucial in many cases. The point is that any one of Justice Blackmun's four factors may or may not have applicability to proffers of nonscientific expert evidence.

Standards and Procedures for Determining the Admissibility of Expert Evidence After Daubert, 157 F.R.D. 571, 579 (1994) (footnote omitted).

B. The Tenth Circuit's Decision Is Consistent With *Daubert*.

Compton requires district courts in the Tenth Circuit to evaluate expert testimony, such as Bihlmeyer's, under Rule 702 and to ensure that the testimony is both relevant and reliable. Petitioners assert that:

> The Tenth Circuit held that *Daubert* is completely inapplicable in [Bihlmeyer's] situation, and that a trial judge accordingly has no duty under Rule 702 of the Federal Rules of Evidence to evaluate the reliability of such expert testimony, even if the expert fails to rely on any principle or methodology of engineering science.

Pet. 9. That statement is simply not accurate.

In concluding that the district court did not abuse its discretion in admitting Bihlmeyer's expert testimony, the court of appeals set forth the standard for the admissibility of expert testimony under the Federal Rules of Evidence. Prior to *Daubert*, the court of appeals recognized that "the 'touchstone' of admissibility [under Rule 702] is helpfulness to the trier of fact." Pet. 6a (citations omitted). Rule 702 requires that "a logical basis [must] exist for an expert's opinion . . . the weaknesses in the underpinnings of the opinion[] go to the weight and not the admissibility of the testimony." Pet. 6a (citations omitted). The traditional Rule 702 analysis "requires the trial court to make a preliminary finding that proffered expert testimony is **both relevant and reliable** while taking into account '[t]he inquiry envisioned by Rule 702 is . . . a flexible one.' " Pet. 8a (emphasis added).

Recognizing that *Daubert* "now mandates a further Rule 702 inquiry", the court of appeals acknowledged that the factors outlined by *Daubert* in Part II-C of the opinion—of whether the theory or technique has been tested; subject to peer review or publication; is generally accepted within the scientific community; or has a known

rate of error—are useful factors for evaluating evidentiary reliability of the methods and procedures of novel scientific evidence. Pet. 7a.

The court of appeals determined that in the absence of scientific testimony presenting some novel principle or methodology, use of the Part II-C *Daubert* factors is unwarranted. Pet. 8a. After *Daubert*, the Tenth Circuit has continued to follow its traditional Rule 702 analysis —that expert testimony must be both relevant and reliable—"except in cases involving unique, untested, or controversial methodologies or techniques" in which case the additional factors developed in *Daubert* apply. Pet. 8a.

The Tenth Circuit concluded that the district court applied Rule 702 but opined that the factors in Part II-C of *Daubert* which this Court developed to evaluate the evidentiary reliability of certain scientific studies, were not applicable to evaluate the evidentiary reliability of Bihlmeyer's engineering testimony. Most importantly, however, and the point Petitioners would have this Court ignore, is that putting the *Daubert* Part II-C factors aside, the court of appeals held that the district court correctly determined Bihlmeyer's testimony met the Rule 702 criteria of relevance and reliability and the district court did not abuse its discretion in admitting his testimony.[8]

Petitioners argue that the court of appeals decision "creates a huge loophole by means of which the 'gatekeeper' obligations imposed on trial judges by Rule 702 can be easily circumvented." Pet. 9. Contrary to this assertion, *Compton* states that district courts are required to evaluate expert testimony, such as Bihlmeyer's, under Rule 702. Pet. 8a. The *Compton* court further clarifies and emphasizes the district courts' Rule 702 duties by declaring that expert testimony must be **both relevant and**

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[8] Petitioners do not challenge the relevance of Bihlmeyer's testimony. Pet. 15a.

reliable. Pet. 8a (emphasis added). Neither the Federal Rules of Evidence nor *Daubert* impose additional obligations on the district courts in this context.

Petitioners argue that the *Daubert* factors of testing, peer review, rate of error and general acceptance should apply to all scientific, technical and other specialized expertise. Pet. 12. This broad reading of *Daubert* beyond its intended scope produces ridiculous results. Much of Bihlmeyer's knowledge is based on scientific principles (force, dynamics, strength analysis, strength of materials), however, his conclusions are not derived by the scientific method as defined in *Daubert*, 509 U.S. at 590.

The rationale supporting *Daubert*'s reliance on the scientific method to evaluate evidentiary reliability is grounded in the testability of scientific knowledge. If a molecular biologist testifies that two blood samples have identical DNA strands, it is possible for a second biologist to test the same samples and methods used in the first analysis and then compare results. Edward J. Imwinkelreid, *The Next Step After Daubert: Developing A Similarly Epistemological Approach To Ensuring The Reliability Of Nonscientific Expert Testimony*, 15 Cardozo L. Rev. 2271, 2284 (1994). However, if the opinion of a farmer is offered on the proper design for shoring an irrigation ditch, a second farmer cannot replicate the first farmer's relevant experience or define a margin of error in the first farmer's methodology. *Id.* The *Daubert* factors do not make sense in evaluating an expert's methods and procedures which are based on his or her experience in a technical field. With technical expertise such as Bihlmeyer's the scientific method is not applicable.

II. PETITIONERS ARE CHALLENGING THE DISTRICT COURT'S FACTBOUND APPLICATION OF SETTLED LAW WHICH IS REVIEWABLE ONLY FOR AN ABUSE OF DISCRETION.

Unsuccessful in attacking Bihlmeyer's credibility at trial, unsuccessful in persuading the jury through their own

expert witness, and unsuccessful in challenging the substance of Bihlmeyer's testimony on appeal, Petitioners again challenge Bihlmeyer's credibility before this Court. Rule 702 establishes a threshold requirement for the admission of expert testimony. Once the court determines that the Rule 702 requirements have been met, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" are the "traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596.

The restrictive, rigid standard Petitioners urge would present plaintiffs with an impossible burden. Petitioners attack Bihlmeyer's testimony because he has never fully designed a roof or roof support structure.[9] Petitioners essentially argue that no expert except one who has decades of experience designing Subaru station wagon roofs would be qualified to testify in this case as an expert. That contention is insupportable as either a practical or logical matter. Plaintiffs simply will not have access to the number of automotive design engineers available to major automobile corporations:[10]

> If we were to declare as a rule of law that one must actually have practical experience in a given industry in order to qualify as an expert in litigation involving its products, we might very well place an onerous burden on plaintiffs in some cases. Where the industry is small and tightly knit, it may be very difficult for the plaintiff to obtain the services of an expert currently employed therein, and it might be equally difficult to find someone who was formerly employed

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[9] Not surprisingly, Kenneth Orlowski, Petitioners' own expert witness, with 23 years of experience with General Motors had never designed a vehicle roof or roof support structure either. Res. Supp. C.A. App. at 251-256, 275-276.

[10] Despite involvement in approximately 100 cases, Petitioners' expert Kenneth Orlowski has never testified against an automobile manufacturer for a plaintiff. Res. Supp. C.A. App. at 267-270.

> in the industry. But the key experts of an industry would normally be available to the defendant.

Knight v. Otis Elevator Co., 596 F.2d 84, 88 (3d Cir. 1979) (quoting *Trowbridge v. Abrasive Co.*, 190 F.2d 825, 829 n.9 (3d Cir. 1951)).

Bihlmeyer has a bachelor's degree in aerospace engineering, a masters degree in mechanical engineering, is a member of the Society of Automotive Engineers, the American Society of Mechanical Engineers, and the American Society of Safety Engineers. In addition to other engineering employment, Bihlmeyer worked as an automotive engineer at the Ford Motor Company for fifteen years, in the brake department, wheel structures department, fuel systems design, and vehicle engineering, which included the development of the roof design of the Ranger Supercab. Bihlmeyer's qualifications to render an engineering opinion on the design of the Subaru roof structure coupled with his training and experience, as well as his detailed and thorough engineering analysis of the Accident Vehicle, more than adequately establish the reliability of his design opinions in this case.

This Court has recognized the fundamentally discretionary nature of Rule 702 determinations and has repeatedly declined to review post-*Daubert* challenges to the lower federal courts' decisions regarding the admissibility of expert testimony in specific cases, including as recently as this Term. *See, e.g., Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316 (7th Cir.), *cert. denied*, 117 S. Ct. 73 (1996).[11]

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[11] *See also Ventura v. Titan Sports, Inc.*, 65 F.3d 725 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1268 (1996); *United States v. Alzanki*, 54 F.3d 994 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 909 (1996); *Carroll v. Litton System, Inc.*, 47 F.3d 1164 (4th Cir.), *cert. denied*, 116 S. Ct. 70 (1995); *Daubert v. Merrell Dow Pharmacueticals, Inc.*, 43 F.3d 1311 (9th Cir.), *cert. denied*, 116 S. Ct. 189 (1995); *United States v. Davis*, 40 F.3d 1069 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1806 (1995); *Habecker v. Clark Equip. Co.*, 36 F.3d 278 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1313 (1995); *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116 (9th Cir. 1994), *cert.*

III. PLENARY REVIEW BY THIS COURT WOULD NOT ALTER THE OUTCOME IN THIS CASE, BECAUSE THE DISTRICT COURT APPLIED THE *DAUBERT* FACTORS.

The district court applied *Daubert* but concluded that most of the *Daubert* factors did not support the exclusion of Bihlmeyer's testimony. Pet. 18a. "[T]he court concludes that to the extent *Daubert* is applicable to Bihlmeyer's opinions, the *Daubert* requirements are satisfied." Pet. 19a.

Daubert offered "general observations" on factors to be considered in analyzing scientific knowledge. *Daubert*, 509 U.S. at 593. The factors developed in *Daubert* are not the only factors, nor do they all have to be met before testimony will be admitted. *Daubert* emphasized that the inquiry under Rule 702 is "a flexible one." *Id.* at 594. *Daubert* teaches "[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test." *Id.* at 593. "Its overarching subject is the scientific validity . . . of the principles that underlie a proposed submission. The focus, of course, must be solely on the principles and methodology, not on the conclusion that they generate." *Id.* at 594-95.

For technical and other specialized knowledge, it is clear the four factors of Part II-C do not apply and to the extent other guidance in *Daubert* applies to Bihlmeyer's testimony it was satisfied. Thus, even were the Court to disagree with the Tenth Circuit's conclusion that the *Daubert* factors were inapplicable here, this Court would then have to determine that the district court's application of those factors constituted an abuse of discretion before the outcome of this case would be affected.

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denied, 115 S. Ct. 734 (1995); *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 902 (1995); *United States v. Muldrow*, 19 F.3d 1332 (10th Cir.), *cert. denied*, 115 S. Ct. 175 (1994); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 114 S. Ct. 2711 (1994).

IV. THERE IS NO CONFLICT OF AUTHORITY IN THE CIRCUITS ON THE FACTBOUND ISSUE PRESENTED IN THIS CASE.

Most circuits to consider the application of *Daubert* to nonscientific evidence have expressly agreed with the Tenth Circuit. For example in *Vadala v. Teledyne Indus.*, 44 F.3d 36 (1st Cir. 1995), a product liability action arising from an airplane crash, the district court excluded plaintiff's expert engineering testimony. Rejecting plaintiff's assertion that exclusion of the testimony conflicted with language in *Daubert* stating that a scientific principal may sometimes be the basis for expert testimony even if it is not "generally accepted" the First Circuit stated:

> *Daubert's* holding . . . has nothing to do with this case, in which the dispute concerns an event rather than a scientific law. More pertinent is *Daubert's* countervailing precept: that the trial judge is assigned "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."

Id. at 39.

In *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038 (2d Cir. 1995), plaintiff McCullock, after working in a bookbinding factory near a hot glue pot that had inadequate ventilation, developed throat injuries. *Id.* at 1041. McCullock brought a successful product liability action against Fuller, the manufacturer of the glue melting pot. Fuller appealed, alleging McCullock's expert testimony on whether McCullock was in the "breathing zone" of the glue fumes did not meet the *Daubert* requirements. *Id.* at 1042.

Affirming the district court's admission of the expert's engineering testimony without applying the *Daubert* Part II-C factors developed for novel scientific evidence, the Second Circuit stated:

> We find that [the expert's] testimony easily qualifies for admission under *Daubert*. Fuller's argument

> ignores [the expert's] extensive practical experience. [The expert's] background and practical experience qualify as "specialized knowledge" gained through "experience, training, or education," Fed.R.Evid. 702, and his testimony was properly admitted.
>
> . . .
>
> Fuller's *Daubert* contention that [the expert's] testimony lacked any grounding in science, and that he merely stated an obvious concept that any layman knows, is meritless. [The expert] based his opinion on the following factors grounded in academic and practical experience: examination of various materials and educational sources on safety regarding the ventilation of an HC binder; review of Fuller's MSDS; interviews with McCullock concerning her work area and the glue pot; background industrial experience with ventilation; and practical experience with fumes. . . .
>
> [The expert] had both the practical experience and necessary academic training to testify whether McCullock was in the breathing zone of the glue fumes. *Id.* at 1043.

Other circuits have also considered the admission of expert testimony without reference to the *Daubert* Part II-C factors developed for assessing the evidentiary reliability of novel scientific testimony. The Ninth, Third and Fifth Circuits have evaluated the relevance and reliability of the expert testimony by focusing on the language of Rule 702 which states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In *Thomas v. Newton Enters.*, 42 F.3d 1266 (9th Cir. 1944), plaintiff was injured falling through an unguarded hatch opening located beneath the termination point of a

ladder. Plaintiff presented expert testimony from a longshore worker with 29 years experience in the shipping industry that the hatch opening was negligently located causing plaintiff injury. *Id.* at 1269. The district court excluded the expert testimony and granted defendant summary judgment.

The Ninth Circuit reversed, holding that:

> *Daubert* was clearly confined to the evaluation of scientific expert testimony. Special concerns arise when evaluating the proffer of scientific testimony that do not arise when evaluating the type of expert testimony offered here. [Plaintiff's expert] conclusions were based on his 29 years of extensive experience on the water front. While a scientific conclusion must be linked in some fashion to the scientific method . . ., [plaintiff's expert's] non-scientific testimony need only be linked to some body of specialized knowledge or skills. *Id.* at 1270 n.3.

In *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777 (3d Cir. 1996), an asbestos products liability case, the district court admitted defendant's expert testimony that radiation exposure in the 1960's was the cause of plaintiff's cancer rather than exposure to the defendant's asbestos. *Id.* at 784. Affirming the district court, the Third Circuit stated:

> [The experts'] backgrounds in the study of mesothelioma and its causes, including radiation, their review of the literature and their review of John Holbrook's history provided substance upon which they could offer scientific opinions that met the required threshold of reliability.

Id. at 785. The Court evaluated the expert's testimony pursuant to *Daubert*, to ensure that it was relevant and reliable, *id.* at 784, without using the *Daubert* factors in Part II-C of testing, peer review and rate of error.

In *Carroll v. Morgan*, 17 F.3d 787, 789 (5th Cir. 1994), a medical negligence case, plaintiff challenged

defendant's physician expert testimony on standard of care under *Daubert* claiming that the expert did not base his testimony on "a well-founded methodology" or on "generally accepted principles within the medical profession." Affirming the district court's admission of the expert testimony under *Daubert*, the Fifth Circuit held that the expert did not present any "objectionable or unconventional scientific theory or methodology" but, rather based his testimony on thirty years of experience as a practicing, board-certified cardiologist and on his review of medical records. *Id.* at 789-90. The Court found that this "ground[ed] [his testimony] in the methods and procedures of science" and found it was not mere "unsupported" speculation. *Id.* at 790.

The cases on which petitioners rely to establish a conflict between the circuits are either distinguishable or reconcilable as depending on the facts and involving the application of an abuse of discretion standard of review to the district courts' determinations to exclude particular expert testimony.

For instance, in *Cummins v. Lyle Indus.*, 93 F.3d 362 (7th Cir. 1996), the plaintiff was injured by a trim press machine. The district court excluded plaintiff's expert engineering testimony on the defective design of the press. The Seventh Circuit, applying an abuse of discretion standard, affirmed the exclusion of the engineer's testimony on the feasibility of alternative designs for the machine and on the adequacy of the warnings. *Id.* at 371. Significant in the court's opinion was the fact the engineer had not tested his alternative design. *Id.* at 368.[12]

In *Deimer v. Cincinnati Sub-Zero Products, Inc.*, 58 F.3d 341, 342-43 (7th Cir. 1995), the plaintiff was in-

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[12] In *Compton*, the district court rejected Petitioners' argument that a lack of testing rendered Bihlmeyer's testimony inadmissible, finding "there was no testimony that testing is an essential element in the methodology of development of engineering opinions such as those given by Bihlmeyer." Pet. 18a.

jured when the power cord on a hypothermia machine detached and caused her to fall, bringing the machine down on top of her. The district court excluded Deimer's expert testimony on the defective design of the cord and granted defendant judgment as a matter of law. *Id.* at 343. In excluding the testimony, the district court made several findings concerning the reliability of Deimer's expert's methods and procedures. *Id.* at 345. Finding the district court did not abuse its discretion, the Seventh Circuit affirmed. *Id.*

Similarly, in *Pestel v. Vermeer Mfg. Co.*, 64 F.3d 382 (8th Cir. 1995), the district court excluded expert engineering testimony on the defective nature of a stump-cutting machine, using the factors developed in Part II-C of *Daubert*. In a cursory two page opinion, the Eighth Circuit affirmed, holding that the district court did not abuse its discretion in excluding the expert's testimony. *Id.* at 384-85. Whether the expert in *Pestel* claimed to rely on his training and experience with stump-cutting machines or on some other methodology to evaluate the product is unclear from the factual record in the opinion. *See Anderson v. F.J. Little Machine Co.*, 68 F.3d 1113, 1116 (8th Cir. 1993) (*Pestel* did not exclude expert testimony concerning safety guards as a matter of law, but recognized that the trial court did not abuse its discretion in excluding the testimony). Finally, in *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293 (8th Cir. 1996), the Eighth Circuit also applied the *Daubert* Part II-C factors to proffered expert engineering testimony on the defective design of a tire changing machine, *id.* at 298, and concluded that the district court did not abuse its discretion in excluding such testimony. *Id.*

Petitioners assert that the experts in *Cummins, Deimer Pestel,* and *Peitzmeier* would avoid judicial scrutiny under the Tenth Circuit's decision in *Compton*. That is simply incorrect. The Tenth Circuit held that all expert testimony must be both relevant and reliable. Pet. 8a. These

are the protections required by Rule 702 and are the standards by which the Tenth Circuit would scrutinize the testimony in cases involving expert engineering testimony.

CONCLUSION

The questions presented in the petition are without merit and do not warrant plenary review. The Tenth Circuit's decision is not in conflict with *Daubert* or any other precedent of this Court. Indeed, the Tenth Circuit's opinion is completely consistent with the requirements of Fed. R. Evid. 702. Therefore, Respondent respectfully requests that the petition be denied.

Respectfully submitted,

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